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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LEE ENTERPRISES, INCORPORATED, a Delaware Corporation and DONALD SCHWENNESEN,
Petitioners,

v.

WARREN E. SIBLE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Montana Supreme Court, by viewing contradicted evidence of actual malice in the light most favorable to a public official libel plaintiff without conducting an independent review of the record, violated the constitutional requirement of independent appellate review mandated by this Court in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) and other cases.

2. Whether the Montana Supreme Court's rejection of a jury instruction defining "reckless disregard of the truth" as "publishing an article with a high degree of awareness of its probable falsity" or "entertain[ing] serious doubts as to the truth of the publication" conflicts with this Court's decisions in *St. Amant v. Thompson*, 390 U.S. 727 (1968) and its progeny.

3. Whether the record in this case fails to establish with convincing clarity that petitioners published false statements with actual malice.

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OPINION BELOW

The opinion of the Supreme Court of Montana, dated November 25, 1986 is reported at 729 P.2d 1271 and is reproduced as Appendix A to this Petition.

JURISDICTION

The decision and order of the Montana Supreme Court was entered November 25, 1986, reversing the judgment of the trial court entered December 14, 1984, on a jury verdict in favor of Petitioners. A timely Petition for Rehearing was denied on January 13, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves portions of the First and Fourteenth Amendments to the Constitution of the United States, which provide as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

U.S. Const. amend. I.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

In late 1982, *The Missoulian*, a newspaper owned by the petitioner Lee Enterprises, Inc.,[1] published several articles about an investigation of the Flathead County, Montana, sheriff's office and the complaints of a number of deputies that triggered the investigation. One of these articles, written by petitioner Don Schwennesen and published December 29, 1982, is the subject of this libel action. The article is reproduced in its entirety as Appendix D. It reports charges against Sheriff Al Rierson made by a former sheriff's detective, Max Salisbury,[2] in a notarized statement given to the governor of Montana. The charges centered on Sheriff Rierson's handling of the alleged theft of a meat smoker by another deputy, the respondent Warren Sible, and Sible's appointment as

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[1] Lee Enterprises, Incorporated has no parent, subsidiary, or affiliate corporations. (Supreme Court Rule 28.1.)

[2] Max Salisbury was one of the original defendants in this case. He remained a named party in the Montana Supreme Court proceedings, although he had reached a settlement with the plaintiff before trial. All other parties to the proceedings below are named in the caption of this Petition. (Supreme Court Rule 21.1(b).)

Chief of Detectives while the investigation was still in progress. Salisbury charged that he was subsequently reprimanded and reassigned because of his part in pressing the investigation.

Schwennesen obtained a copy of the statement and conducted his own investigation of the charges. Everyone he interviewed confirmed the basic facts of the alleged theft, the investigation by Salisbury, Sible's appointment by the sheriff, and Salisbury's subsequent reprimand and reassignment. Sible himself admitted he had the smoker in question, but denied stealing it. Both the sheriff and Sible confirmed the fact of Salisbury's reprimand and reassignment, but denied Salisbury's charge that it was connected to his investigation. App. D.

Schwennesen's article reported the substance of at least eight separate interviews, with a major part of the article devoted to Sheriff Rierson's and Lieutenant Sible's side of the story.[3] The article reached no conclusion on the merits of either Salisbury's charges or the smoker investigation, but simply noted that the investigation of the sheriff's office was continuing.[4] *Id.*

On February 7, 1983, approximately five weeks after publication, Sible sued *The Missoulian*, Schwennesen, and Salisbury for defamation, claiming $30,000,000 in damages. The complaint alleged that the charges of theft,

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[3] Sible did not dispute the accuracy of Schwennesen's reporting. He alleged libel from republication of Salisbury's charges and use of the words "theft," "harassment," and "cover-up" in the article. Brief of Appellant at 3.

[4] The statement of facts included in the Opinion of the Montana Supreme Court, App. at 2a-5a, does not accurately reflect the record. Rather, as the court admitted, it "view[s] the evidence in a light most favorable to the appellant," App. at 2a, and was taken directly from highly selective and argumentative assertions contained in the Brief of Appellant. The court also admitted that the evidence was disputed. App. at 5a.

cover-up, and harassment were false and were published with actual malice.

Trial to a jury commenced November 5, 1984. The testimony at trial was substantially the same as the statements made to the reporter, reflecting the same differences of opinion and interpretation reported in the article. There were two significant differences, however.

First, plaintiffs called as a witness John Christian, a subordinate of Sible, and Salisbury's former partner, who had not been interviewed by Schwennesen.[5] Christian confirmed many of the details reported in the article, but he also testified that, had he been interviewed, he would have told Schwennesen that the investigation of Sible was completed, and that he concluded that Sible's smoker was not the same one reported as stolen.[6] Tr. 1054-65.

Second, in the middle of trial Sible reversed his prior statements to the reporter that he had possession of the missing smoker. Sible testified that until midtrial he believed that he had the smoker in question and had told Schwennesen that he had it, but he now realized that it was not the same smoker. Tr. 1340.

After a four-week trial, the jury returned a verdict finding that the charges were false, but that the plaintiff had failed to prove

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[5] Salisbury originally suggested that Schwennesen contact Christian to corroborate his charges. Tr. 415. When the reporter called, he was told Christian was on vacation. Tr. 1851. By the time Christian returned from vacation the basic facts had already been corroborated by the sheriff, Sible, and others, and Schwennesen was satisfied that Salisbury's charges were made in good faith. Tr. 1872-73.

[6] Much of Christian's testimony was impeached by prior inconsistent statements from his earlier deposition testimony. He also admitted that after the article was published, he destroyed photographs used for identification of the smoker during the investigation. Tr. 1113-29 and 1144-45.

> by clear and convincing evidence that the newspaper article was published by defendants Don Schwennessen and Lee Enterprises, Inc. with "actual malice," that is, knowing it was false, or in reckless disregard of whether it was true or false.

App. at 13a-14a.[7] Judgment on the verdict was entered for defendants; plaintiff's motion for a new trial was denied January 26, 1985, and the case was appealed to the Montana Supreme Court.

The issues presented by this Petition were argued to the Montana Supreme Court in both the briefs of the parties and the petition for rehearing.

On the issue of appellate review, Sible himself acknowledged that the appellate court was required under *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984), to conduct an independent review of the record as to the ultimate question of actual malice, giving due deference to the jury's findings on issues of credibility. Brief of Appellant at 33. Petitioners responded that the jury's verdict could be sustained under traditional principles governing review of jury determinations, but that in any event, the constitutional requirement of clear and convincing proof and the subjective nature of the actual malice determination, when taken together, were sufficient to sustain the jury's verdict on the issue, even under Sible's argument of the *Bose* standard of review. Brief of Respondents at 24-25.

The Montana Supreme Court ignored both positions and held instead, without citation of authority, that it "must view the evidence in a light most favorable to the appellant and then determine whether the court's instructions adequately presented appellant's case to the jury." App. at 2a.

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[7] The trial court had previously ruled that Sible, a Lieutenant and Chief of Detectives in the Sheriff's Department, was a public official for purposes of application of the *New York Times* rule. Sible continued to contest that ruling on appeal.

On the issue of actual malice, Sible argued several theories.[8] His principal theory, however, was that Schwennesen's failure to interview Christian constituted a "departure from the standards of investigating and reporting normally adhered to by responsible journalists," and that such "departure from normal standards" constituted "reckless disregard of the truth" under Justice Harlan's plurality opinion in *Curtis Publishing Co. v. Butts*, 338 U.S. 130 (1967).[9] Brief of Appellant at 34. He challenged Jury Instructions 12 and 13 on this ground.

Petitioners argued that the determination of actual malice was controlled by *St. Amant v. Thompson*, 390 U.S. 727 (1968), and its progeny, and that the instructions given by the trial court were proper under those cases.

The Montana Supreme Court, without citation to or discussion of *St. Amant*, ruled that Jury Instruction 12 defining "reckless disregard" in language taken verbatim from *St. Amant* was "fatally defective" in that it prevented the jury from finding reckless disregard from failure to investigate where the reporter has no actual serious doubts about the falsity of the material, but

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[8] Sible argued that *The Missoulian* knew its charges were false because it knew Sible was not charged with "theft," but was "the subject of a non-criminal internal probe," and it knew there had been no "cover-up," because the complaint about the smoker had been aired publicly. He also argued that the Missoulian had obvious reasons to doubt the truthfulness of Salisbury's notarized statement to the Governor, because it knew Salisbury was a disgruntled ex-employee and his statement was politically motivated. Brief of Appellant at 37-43.

[9] Justice Harlan's opinion commanded the votes of only three other members of the Court. The remaining Justices, comprising a majority, would have applied the *New York Times* test of actual malice or even greater protection. 388 U.S. at 170 (Warren, C.J., concurring), 170-72 (Black, J., joined by Douglas, J., concurring), and 173 (Brennan, J., joined by White, J., concurring).

knows that the source of its information is "highly suspect." [10] App. at 6a.

A timely petition for rehearing was filed by petitioners, rearguing the propriety of the *St. Amant* definition of "reckless disregard" and arguing the need for independent appellant review of the actual malice issue under *Bose*. The petition for rehearing was denied without opinion on January 13, 1987. App. at 15a.

ARGUMENT

I. SUMMARY REVERSAL IS APPROPRIATE IN THIS CASE

The errors of the Montana Supreme Court in this case are so obvious under this Court's rulings in *Bose* and *St. Amant* that further briefing and argument of the points should be unnecessary, and summary reversal under Supreme Court Rule 23.1 is appropriate.

The Montana court ignored its constitutional duty to independently "determine whether the record establishes actual malice with convincing clarity," as required by *Bose*, 466 U.S. at 514, and compounded the error by viewing the evidence in a light most favorable to the libel plaintiff, the *losing* party at trial.

The court then rejected jury instructions incorporating the very language and reasoning used by this Court

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[10] On appeal, Sible also argued that he should not have been considered a public official and that the trial court erred in refusing to compel production of Schwennesen's notes, protected under a Montana "shield law" or "reporter's privilege" statute. Petitioners cross-appealed from the trial court's failure to grant summary judgment for defendants prior to trial. The Montana Supreme Court found two of these issues to be dispositive—the issue of the actual malice jury instructions, and the state "shield law" issue. The court's ruling that protection of the shield law was waived is not presented here as a separate question for review. However, it is relevant to a complete review of the record under *Bose* and therefore should not be viewed as purely a matter of state law.

to define "reckless disregard of the truth" in *St. Amant*, and did so without once mentioning that case:

> Under the instructions of the court, the jury could have found that *The Missoulian* was reckless in failing to investigate but nevertheless found there was no malice because *The Missoulian* did not entertain serious doubts about the actual truth of the statement. Upon remand, the Court will instruct upon the proper standard without embellishment.

App. at 7a.

Here, the need for summary reversal is particularly acute. If this Court does not reverse these errors, the trial court upon remand, and every other trial court in the State of Montana, will be faced with an impossible dilemma. They will have to choose either to disregard the constitutionally based mandate of this Court in such cases or to disregard the unequivocal order of the highest court of Montana.

By the Montana Supreme Court's own words, "the jury could have found . . . there was no [actual] malice because *The Missoulian* did not entertain serious doubts about the actual truth of the statement." App. at 7a. This being so, it is clear that the verdict in favor of the newspaper was proper and should be reinstated. Under Supreme Court Rule 23.1 this Court may, and should, issue an order summarily reversing the decision of the Montana Supreme Court and reinstating the judgment of the trial court below.

II. THE MONTANA SUPREME COURT FAILED TO INDEPENDENTLY DETERMINE THE ISSUE OF ACTUAL MALICE AS REQUIRED BY THIS COURT IN *BOSE*

In *Bose Corp. v. Consumers Union of United States*, this Court recently reaffirmed the constitutional duty of all appellate courts to "exercise *independent* judgment and determine whether the record establishes actual mal-

ice with convincing clarity." 466 U.S. at 514 (emphasis added). *Bose* made it clear that this obligation of independent review "is a rule of federal constitutional law," *id.* at 510, that preempts the convenient presumptions and inferences applied by appellate courts in ordinary cases. It also made clear that appellate courts " 'cannot avoid making an independent constitutional judgment on the facts of the case.' " *Id.* at 508 n.27, quoting *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964) (Opinion of Brennan, J.)

In this case, because jury instructions were challenged, the Montana Supreme Court confined its review solely to a view of the evidence "in a light most favorable to the appellant [plaintiff]," App. at 2a, to determine whether his theory of the case was adequately presented to the jury. The court made no attempt to review the substantial and conflicting evidence from which the jury found an absence of actual malice.

The Montana court's failure to independently review the evidence had a pervasive effect on its decision. By blindly accepting the plaintiff's version of the facts, the court was led to believe that *The Missoulian* knew the charges against Sible were "highly suspect," a conclusion that would have been impossible upon a review of the entire record. This faulty assumption, in turn, led the court to conclude that under such imagined circumstances, a newspaper "should, and it does, have a duty to investigate before publishing," App. at 6a, and to remand the case for a new trial, without any further discussion of the record.

Thus, as a result of the appellate court's failure to independently examine the evidence, a proper jury verdict and judgment achieved by the Petitioners after an expensive and time-consuming trial were reversed and remanded for still further proceedings. There was simply no consideration by the Montana court of whether the

evidence satisfied the threshold constitutional standard of convincing clarity. This is precisely the kind of threat to First Amendment freedoms that this Court's ruling in *Bose* sought to prevent. *See* 466 U.S. at 510-11.

If the decision of the Montana Supreme Court is not summarily reversed as requested in Section I, *supra*, then certiorari should be granted not only to cure the unconstitutional result in this case, but also to emphasize for other appellate courts the importance of their constitutional duty to independently review evidence of actual malice in libel cases.

III. THE INSTRUCTION ON "RECKLESS DISREGARD" REQUIRED BY THE MONTANA SUPREME COURT IS IN DIRECT CONFLICT WITH EVERY PRONOUNCEMENT OF THIS COURT ON THE ISSUE

In *St. Amant v. Thompson*, this Court defined "reckless disregard of the truth" as that term relates to the determination of actual malice and explained its rationale:

> Our cases . . . have furnished meaningful guidance for the further definition of a reckless publication. . . . In *Garrison v. Louisiana*, 379 U.S. 64 (1964) . . . the opinion emphasized the necessity for a showing that a false publication was made with a "*high degree of awareness of . . . probable falsity.*" 379 U.S., at 74. . . . These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact *entertained serious doubts as to the truth of his publication.* Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

390 U.S. at 731.

The trial court, in a conscientious attempt to avoid confusing the jury, gave two instructions drawn directly

from *St. Amant.* The first incorporated the language emphasized in the above quotation:

> INSTRUCTION NO. 12
>
> The term "reckless disregard of the truth," as used in these instructions, does not mean mere negligence, or even gross negligence or wanton conduct. Rather, it means publishing an article with a high degree of awareness of its probable falsity, or that the Defendants, in fact, entertained serious doubts as to the truth of the publication.

App. at 5a. The second instruction quoted almost verbatim from *St. Amant*, 390 U.S. at 731, the examples suggested by this Court of conduct which might indicate evidence of reckless disregard. App. at 5a-6a.

The Montana Supreme Court, in reversing both instructions, did not attempt to explain its departure from the rule in *St. Amant;* the court simply ignored it:

> Instruction No. 12 is fatally defective in that it defines "reckless disregard of the truth," as used in Instruction No. 11, as being equivalent to having serious doubts about the truth of the statement.

App. at 6a. Even more puzzling, the court justified its conclusion by noting that "[s]uch a rule encourages irresponsible journalism," App. at 6a, the very argument discussed at length and rejected by this Court in *St. Amant.*[11]

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[11] *See St. Amant*, 390 U.S. at 731-32:

> It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. . . . But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies.

This Court has reasserted and followed the *St. Amant* formulation of "reckless disregard" in every relevant decision over the past 19 years.[12] If the decision of the Montana Supreme Court is allowed to go unchallenged, it will stand as a summary reversal, unreasoned and unexplained, of one of the fundamental tenets of the actual malice rule—that the showing necessary to overcome First Amendment protection is an inquiry into the publisher's subjective state of mind, not a jury's vague notion of what constitutes "reckless" conduct.

As previously noted, this case is appropriate for summary reversal on this issue. If that is not the order of this Court, however, then certiorari must be granted to consider the full implications of such a drastic departure from the established First Amendment principles governing defamation law.

IV. THERE IS NO CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE UNDER ANY PROPER FORMULATION OF THE RULE

The jury in this case, properly instructed on the issues of actual malice and reckless disregard, specifically found that the plaintiff had failed to establish actual malice with convincing clarity. There is no need for this Court to go further. As the Montana Supreme Court itself recognized:

> Under the instructions of the court, the jury could have found . . . there was no [actual] malice because the Missoulian did not entertain serious doubts about the actual truth of the statement.

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[12] *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. at 511 n.30; *Herbert v. Lando*, 441 U.S. 153, 156 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974); *Time, Inc. v. Pape*, 401 U.S. 279, 291-92 (1971). *See also Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 163 (1979); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 276 (1971); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85 (1967); *Garrison v. Louisiana*, 379 U.S. 64, 75-76 (1964).

App. at 7a (emphasis added). Under *St. Amant*, of course, such a finding by the jury was entirely proper and was consistent with both the purpose and the rationale of the actual malice rule as expressed by this Court. From this finding alone, the Court could conclude that, *a fortiori*, the evidence lacked convincing clarity, and that the verdict and judgment in the trial court should be summarily reinstated under Rule 23.1.

On the other hand, it can be argued that independent review of the evidence is required by *Bose* regardless of the jury's finding on the issue of actual malice. *See Bartimo v. Horsemen's Benevolent and Protective Ass'n*, 771 F.2d 894, 896-98 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1635 (1986). Although the logic of such an argument is open to question, it should not affect the Court's ultimate decision in this case. Even a brief review of the news story itself and the undisputed facts should convince the Court that a finding of actual malice is virtually impossible on this record.

The argument that petitioners knew Salisbury's charges were "highly suspect" simply is not supported by the record. The evidence shows that *The Missoulian* did not merely report Salisbury's charges, but subjected them to a responsible and searching inquiry, interviewing at some length the key figures involved. The result of that investigation convinced Schwennesen and his editors that the charges had a reasonable basis and were made in good faith. Tr. 1952-53.

Among other things, at the time of publication everyone, including Sible himself, believed he had the missing smoker. The sheriff had ordered an investigation. These facts alone made Salisbury's charges anything but "suspect". Tr. 282, 311, 1838-39, 1856, 1858, 1864. In addition, both Sible and the owner of the missing smoker independently recalled facts that tended to fix the events at a single point in time, which resolved any discrepancy between the owner's recollection of 1975 as the time of

the theft and Sible's off-hand remark that he had acquired his smoker some "14 years ago". Tr. 1858, 1860-61. Finally, it was undisputed that the sheriff appointed Sible Chief of Detectives and transferred Salisbury to the patrol division before the investigation of Sible was completed. A knowledgeable source in the County Prosecutor's Office also contradicted the sheriff's claim that the investigation had been resolved. These facts supported Salisbury's charge that the investigation of Sible was covered up. Tr. 474, 476, 1840, 1866.

From all evidence available at the time of publication, Salisbury's allegations were anything but "highly suspect." Nevertheless, Schwennesen discussed the inconsistencies among the various versions of the facts with his editor, and together they resolved any doubts about the probability or good faith of Salisbury's charges. In their minds, Sible's admission that he was in possession of the smoker was a key factor that added further credibility to Salisbury's charges. Tr. 1967. At the time of publication, they clearly entertained no serious doubts as to the truth of the statements published.

Finally, it must be noted that the jury had before it an instruction detailing in the language of *St. Amant* that actual malice *could be found* from "inherently improbable" charges or "obvious reasons to doubt the veracity of the informant." The fact that the jury found an *absence* of actual malice in the face of these instructions stands as the strongest indication that it believed Schwennesen's assertions of good faith.

On this record, under any proper formulation of the reckless disregard rule, it is clear that actual malice was not and could not be established.

CONCLUSION

The damage caused by the errors in this case cannot be overstated. The Montana Supreme Court did not merely fail to perform its own constitutional duty under *Bose*; it totally nullified the First Amendment protection secured through careful application of the actual malice rule by the trial judge and the jury.

The serious impact of the court's error is not confined to this single case. The Montana Supreme Court has, in effect, overruled application of the *St. Amant* rule in Montana, and has drastically undermined the purposes of the actual malice rule.

Petitioners respectfully urge this Court to act immediately to reverse these errors, either by summary reversal of the Montana Supreme Court or by granting certiorari to conduct its own review of this record.

Respectfully submitted this 14th day of April, 1987.

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APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF MONTANA
1986

No. 85-181

WARREN E. SIBLE,
Plaintiff and Appellant,

v.

LEE ENTERPRISES, INC., an Iowa Corp.;
DONALD SCHWENNESEN; and MAX SALISBURY,
Defendants and Respondents.

Appeal From District Court of the Eleventh Judicial District, In and for the County of Flathead, The Honorable Michael Keedy, Judge presiding

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Submitted on Briefs: June 12, 1986

Decided: November 25, 1986

Filed:

/s/ Ethel M. Harrison
ETHEL M. HARRISON
Clerk

Mr. Justice Frank B. Morrison, Jr. delivered the Opinion of the Court.

This is an appeal from the Flathead County District Court jury trial and verdict finding the respondents had not published a newspaper article with actual malice.

We reverse and remand for a new trial.

On December 29, 1982, *The Missoulian* published an article authored by Donald Schwennesen headlined "Ex-detective accuses Flathead County sheriff of coverup, harassment." The article concerned an allegation by a former Flathead County Sheriff's detective, Max Salisbury, that appellant, Sible, had stolen a meat smoker and covered up the investigation concerning the theft.

Numerous issues are raised in this Court but we find two to be dispositive and to require reversal. Appellant contends that the court improperly instructed the jury on duties owed by *The Missoulian* to appellant, Sible. Further, appellant contends that the court erred in applying the "shield law" to protect Schwennesen's notes from being discovered once he had testified as a witness. We find the appellant to be correct on both counts.

First, we must view the evidence in a light most favorable to the appellant and then determine whether the court's instructions adequately presented appellant's case to the jury. For our purposes, we assume that appellant was a public official and that the "malice" standard articulated in New York Times Co. v. Sullivan (1964), 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, applies to the case we here review.

In summary, in viewing the evidence in a light most favorable to the appellant, *The Missoulian* article charged that appellant had been investigated for theft and indicated that he may have misused his official position by participating in a coverup of his crime. Specifically, the article states that Max Salisbury filed a notarized statement with the Governor of Montana charging "his in-

vestigation of a theft involving a fellow officer (appellant) was covered up." The article further stated that appellant harassed Salisbury and forced him to terminate his employment.

The charges of theft concerning appellant arose as the result of a "smoker" allegedly taken from one William Eckerson. Eckerson lost his "smoker" in 1974. The "smoker" was worth between $15 and $20. Appellant did in fact have a similar "smoker", but he obtained his "smoker" in 1970. A subsequent internal investigation within the Sheriff's Department determined that appellant's "smoker" was not the one taken from Eckerson and the matter was dropped. The "smoker caper" was generally known to the Kalispell journalism community. Dan Black, managing editor of *The Daily Interlake*, in Kalispell, refused to publish a story because of the unreliability of the charges made by Salisbury against appellant.

Salisbury's statement regarding appellant was made during a time of political controversy. Sheriff Rierson, the incumbent Flathead County Sheriff, was engaged in a hot election contest during the fall of 1982. Salisbury was supporting Rierson's opponent. On October 6, 1982, Rierson's opponents gathered at the home of one Stevens for the purpose of developing campaign strategy. Salisbury attended this meeting. Stevens informed Salisbury during the meeting that they needed a statement from Salisbury charging appellant with stealing the "smoker" so that they could embarrass Rierson by showing appellant, who worked for Rierson, covered up the investigation of his own theft. At the meeting, Stevens told Salisbury that his friend, the reporter Schwennesen, promised to write an article after the statement was prepared.

Schwennesen knew Stevens disliked Rierson's administration. Schwennesen informed Stevens that a written notarized statement was necessary for him to write a story. Schwennesen admitted he knew Salisbury's state-

ment resulted from Stevens' encouragement and that he knew Stevens was helping Rierson's opponent. Schwennesen further knew that Stevens had assisted Salisbury in preparing the statement which provided the basis for the subject story in *The Missoulian*. Salisbury became very nervous about Schwennesen doing a story on the "smoker caper." One John Christian was an investigating officer on the "smoker" allegation. Salisbury asked Schwennesen to contact Christian about the truth of the charges, stating Christian would be open and honest. Both Schwennesen and his editor were aware that Salisbury was nervous about the charges and had requested Christian be contacted to confirm the truth or falsity of the allegation before an article was published.

Schwennesen promised to make an independent investigation of the truth of the charges and contact Christian before publishing an article. Despite his promise, Schwennesen eventually published the story without contacting Christian and without determining in his own mind if Salisbury's charges were true or false.

Specifically, with reference to the instructions which are hereafter discussed, Schwennesen testified that it occurred to him Salisbury might have signed a false statement. Schwennesen testified under oath that he knew Christian could shed light on the charges of "theft", "coverup" and "harassment". Despite this fact, Schwennesen failed to interview Christian, although Christian was available and willing to be interviewed. Christian testified at the trial that the charges made by Salisbury were without merit and that he would have so advised Schwennesen had he been contacted by Schwennesen prior to publication.

Eckerson, the man who lost his "smoker" in 1974, attempted to dissuade Schwennesen from printing an article. Eckerson told Schwennesen the story was "garbage" which should not be published and further advised Schwennesen that *The Missoulian* would be sued for publishing the article. Despite Eckerson's misgivings,

Schwennesen informed Eckerson that the story would be published no matter what he said.

With this evidence before the jury, although disputed, the District Judge gave the following three instructions:

INSTRUCTION NO. 11

As a matter of law, Plaintiff is a public official, and the newspaper article in question concerned his official conduct. As such, he may not recover against either Defendant unless he proves that the newspaper article was false, unprivileged, and defamatory, and that it was published with malice, that is, with knowledge that it was false, or with a reckless disregard of the truth.

INSTRUCTION NO. 12

The term "reckless disregard of the truth," as used in these instructions, does not mean mere negligence, or even gross negligence or wanton conduct. Rather, it means publishing an article with a high degree of awareness of its probable falsity, or that the Defendants, in fact, entertained serious doubts as to the truth of the publication.

INSTRUCTION NO. 13

The following are examples of the types of conduct which constitute malice in publishing a statement or allegation:

1) The story was fabricated by the Defendant; or,

2) The story was the product of the Defendants' imagination; or,

3) The story was based wholly on an unverified and anonymous telephone call; or,

4) The story contains allegations that are so inherently improbable that only a reckless person would put them into circulation; or,

5) The story was published despite obvious reasons to doubt the veracity of the informant upon whom the article was based, or to doubt the accuracy of his reports.

This list is provided to aid you in determining whether malice has been shown by the evidence in this case. By providing it, the Court does not mean to suggest that the list is all-encompassing and therefore exclusive, nor does it suggest that the evidence supports or does not support the presence of any such conduct in this case.

Instruction No. 11 is taken from New York Times Co. v. Sullivan, *supra*. The instruction is a correct statement of the law. Instruction No. 12 is fatally defective in that it defines "reckless disregard of the truth", as used in Instruction No. 11, as being equivalent to having serious doubts about the truth of the statement. Instruction No. 13 is erroneous in that it seeks to itemize instances of malice to the exclusion of other instances which may not have occurred to the District Judge. Lists such as the one set forth in Instruction No. 13 are seldom appropriate.

The effect of Instruction No. 12 is to shield a newspaper where it knows that the source of its information is highly suspect but fails to investigate. The newspaper is shielded because it failed to investigate and find out that certain information was false, choosing rather to close its eyes and publish with no actual serious doubts about the falsity of the material. Such a rule encourages irresponsible journalism. When a newspaper has facts that indicate material is highly suspect, it should, and it does, have a duty to investigate before publishing.

Instruction No. 11 correctly stated the law. A newspaper is only liable for malice where it publishes with

knowledge of falsity or with a reckless disregard of the truth.

The erroneous instructions may well have influenced the outcome of this case. Schwennesen and his editor had reason to believe that Salisbury's statement was highly suspect. Schwennesen failed to interview Christian, who would have told him that the statement was without any substance or merit. *The Missoulian* published Salisbury's statement without fully investigating and therefore, without actually knowing the statement was false. Under the instructions of the court, the jury could have found that *The Missoulian* was reckless in failing to investigate but nevertheless found there was no malice because *The Missoulian* did not entertain serious doubts about the actual truth of the statement. Upon remand, the court will instruct upon the proper standard without embellishment.

Appellant further raises error in the District Court's ruling which applied the "shield law" to protect Schwennesen's notes. Generally, a reporter's sources are privileged. The applicable statutes are found in the "Media Confidentiality Act", §§ 26-1-901, et seq., MCA. Section 26-1-902, MCA, provides:

> (1) Without his or its consent no person, including any newspaper, magazine, press association, news agency, news service, radio station, television station, or community antenna television service or any person connected with or employed by any of these for the purpose of gathering, writing, editing, or disseminating news may be examined as to or may be required to disclose any information obtained or prepared or the source of that information in any legal proceeding if the information was gathered, received, or processed in the course of his employment or its business.
>
> (2) A person described in subsection (1) may not be adjudged in contempt by a judicial, legislative, administrative, or any other body having the power to

> issue subpoenas for refusing to disclose or produce the source of any information or for refusing to disclose any information obtained or prepared in gathering, receiving, or processing information in the course of his or its business.

The above-quoted statute protects a reporter's sources. Schwennesen's notes were shielded by this statute until he took the witness stand or testified by way of deposition. Section 26-1-903(2), MCA, provides:

> (2) If the person claiming the privilege voluntarily offers to testify or to produce the source, with or without having been subpoenaed or ordered to testify or produce the source, before a judicial, legislative, administrative, or other body having the power to issue subpoenas or judicially enforceable orders, he or it waives the provisions of 26-1-902.

Under this provision, Schwennesen waived his privilege to keep his notes confidential. Upon retrial the notes are subject to discovery if Schwennesen testifies.

Judgment in favor of *The Missoulian* is vacated. The case is remanded for a new trial in accordance with the views herein expressed.

/s/ Frank B. Morrison, Jr.
Justice

We concur:

/s/ J. A. Turnage
Chief Justice

/s/ Fred J. Weber

/s/ John Conway Harrison

/s/ L. C. Gulbrandson

/s/ John C. Sheehy
Justices

Mr. Justice William E. Hunt, Sr., concurring:

I concur with the majority opinion concerning the jury instructions given by the Court and I concur in the reversal of the action on that basis. However, I do not agree with the majority that the facts are as clear as they present them.

My review of the record indicates that the article contains errors and omissions, and in the final analysis proved to be false. However, the fact that the article ultimately proved to be false does not change my belief that Sible has failed to clearly and convincingly prove that the article was published with actual malice. As stated in New York Times Co. v. Sullivan (1964), 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686.

> The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and belief which are offered." (Citation omitted.)
>
> [E]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive . . ." (Citation omitted.)

376 U.S. at 271-72, 84 S.Ct. at 721, 11 L.Ed.2d at 701.

Montana is also committed to the notion that freedom of expression should be as broad and unfettered as possible recognizing such freedom must be weighed against an individual's right of privacy and reputation. 1972 Mont. Const., Art. II, § 7; Cox v. Lee Enterprises (Mont. 1986), 723 P.2d 238, 43 St.Rep. 1476.

Sible raises a number of errors and omissions in the article, but especially finds fault with respondents' failure to adequately investigate the story, and with the use of the words "theft" and "coverup." Investigatory failures alone are insufficient to establish reckless disregard of the truth. Instead, Sible must show that the respondents' conduct was highly unreasonable and constituted "an

extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Curtis Publishing Co. v. Butts (1967), 388 U.S. 130, 155, 87 S.Ct. 1975, 1991, 18 L.Ed.2d 1094, 1111.

Here, while respondents' investigation could have been more thorough, it was not so unreasonable as to constitute an extreme departure from responsible publishing standards.

Prior to his work on this story, Schwennesen had never met Salisbury, and knew Sible only by appearance. Sible testified he did not believe Schwennesen or anyone else at *The Missoulian* was "out to get him." Schwennesen interviewed all the major participants involved except one, a deputy named Christian. He attempted to contact Christian twice but he was on vacation. Schwennesen did not contact Christian after he returned from vacation because by that time, Sible had admitted to Schwennesen that he had the smoker. *The Missoulian* also consulted with its legal counsel prior to publication.

Schwennesen testified that Salisbury appeared to be candid, forthright, and "sincerely believed what he was telling" him. Further, Schwennesen verified the majority of facts in the story. He confirmed that the smoker was missing and that Sible admitted having it in his possession. Salisbury's investigation into the matter was authorized by Sheriff Rierson who later put Sible in charge of the detective division. Salisbury's subsequent reprimand, transfer to patrol, and ultimate resignation were verifiable facts. I do not agree that respondents' investigatory failures were so extreme as to amount to reckless disregard of the truth.

Sible argues respondents' use of the words "theft" and "coverup" in the article constitute reckless disregard of the truth. None of the sources for the story used those words and Sible argues their use by Schwennesen

amounted to fabrication and publication of a known falsehood. I do not agree.

The owner of the smoker, Eckerson, told Schwennesen that he had seen a smoker that looked like his on property he believed to be Sible's. Eckerson further testified that he thought Sible had taken his smoker, but did not want to make an issue of it. In Salisbury's notarized statement which Schwennesen read, he states that a man, Eckerson, told him Sible "stole his smokehouse." Salisbury went to Sible's residence and "located the smokehouse." Although no one used the word "theft," it was implied from the statements and interviews Schwennesen had prior to publication.

The use of the word "coverup" derived from the fact that after Sible was placed in charge of the detective division, Salisbury was reprimanded for failure to solve cases and his demeanor with female complainants. He later transferred to the patrol division and ultimately resigned.

I do not agree that respondents acted in reckless disregard of the truth in using the words "theft" and "coverup." Instead, the article was based upon interviews with the major participants and probable conclusions from verified facts.

Furthermore, I do not believe Schwennesen waived his shield law as set out in § 26-1-902, MCA, by taking the stand.

Schwennesen was named defendant in this action. He did not file a counterclaim or a cross-claim, but did take the stand in his own defense. He testified in great detail as to the circumstances involving preparation of the article. However, at no time did Schwennesen offer to introduce any portion of his notes into evidence, nor did he refer to his notes in his testimony to refresh his recollection or bolster his testimony. I cannot agree that Schwennesen ever "voluntarily offered" to produce or testify concerning the contents of his notes.

The case of Lal v. CBS, Inc. (E.D.Pa. 1982), 551 F. Supp. 364, *Aff'd* (1984), 726 F.2d 97 is similar. In that case, a federal district court judge held a reporter's notes privileged under Pennsylvania's shield law even though the reporter had already revealed her primary sources. In this case, Schwennesen revealed his sources and testified concerning preparation of the article. He did not voluntarily testify concerning his notes or their contents.

Section 26-1-902, MCA, was written to encourage a free and dynamic press by protecting journalists and related media personnel from compelled disclosure of sources and confidential information. It is our duty to uphold legislative intent whenever possible. Therefore, I would conclude that the District Court was correct in refusing to compel production of Schwennesen's notes.

Because I agree that the jury was not properly instructed as to actual malice, I concur with the majority in reversing and remanding for new trial.

/s/ William E. Hunt, Sr.

APPENDIX B

IN THE DISTRICT COURT
OF THE ELEVENTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF FLATHEAD

Cause No. DV-83-076

WARREN E. SIBLE,
Plaintiff,

vs.

LEE ENTERPRISES, INC., an Iowa corporation,
DONALD SCHWENNESEN and MAX SALISBURY,
Defendants.

JUDGMENT ON VERDICT

This matter came regularly on for trial before the Court sitting with a jury November 5, 1984. Plaintiff was represented by Alan J. Lerner, Esq. Defendants Lee Enterprises, Inc. and Donald Schwennesen were represented by Harold V. Dye, Esq. Witnesses testified and exhibits were received into evidence.

Thereafter on December 5, 1984, the matter was submitted to the jury which returned the following verdict, to wit: We the jury eight or more of our number find in this cause as follows:

1. Has the Plaintiff proved by a preponderance of the evidence that the newspaper article in question was false, unprivileged, and defamatory?

Yes X No

2. Has the Plaintiff proven by clear and convincing evidence that the newspaper article was published by

Defendants Don Schwennesen and Lee Enterprises, Inc. with "actual malice" that is knowing it was false or in reckless disregard of whether it was true or false?

Yes No X

DATED this 5th day of December, 1984.

/s/ Beth Burren,
Foreperson

On the basis of the foregoing verdict,

IT IS ORDERED and ADJUDGED that Plaintiff take nothing by his Complaint and that Defendants Lee Enterprises, Inc. and Donald Schwennesen recover their costs herein expended as allowed by the Court.

DATED this 14th day of December, 1984.

/s/ Michael H. Keedy
District Judge

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APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. 85-181

WARREN E. SIBLE,
Plaintiff and Appellant,

v.

LEE ENTERPRISES, INC., an Iowa corporation; DONALD SCHWENNESEN; and MAX SALISBURY,
Cross-Claimants and Respondents.

ORDER

[Filed Jan. 13, 1987]

The petition for rehearing is denied.

DATED this 13th day of January, 1987.

/s/ J. A. Turnage
Chief Justice

/s/ John Conway Harrison

/s/ Frank B. Morrison, Jr.

/s/ Fred J. Weber

/s/ L. C. Gulbrandson

/s/ John C. Sheehy
Justices

Mr. Justice William E. Hunt, Sr., would grant a rehearing.

APPENDIX D

Western Montana
Missoulian, Wednesday, December 29, 1982 Page 16

EX-DETECTIVE ACCUSES
FLATHEAD COUNTY SHERIFF
OF COVERUP, HARASSMENT [1]

Dispute centers on stalled theft probe

(First of two parts)

By DON SCHWENNESEN
of the Missoulian

KALISPELL—A former Flathead County sheriff's detective has charged that his investigation of a theft involving a fellow officer was covered up by outgoing Sheriff Al Rierson, who then harassed him until he quit the department.

Max Salisbury outlined his charges in a written, notarized statement prepared in October when six others filed complaints of intimidation against the sheriff.

His statement did not go to County Attorney Ted Lympus, but was given to Gov. Ted Schwinden in October. Schwinden's office is not investigating the charge.

The incident involves a meat smoker belonging to a former state game warden, who said it was stolen in 1975.

Both Rierson and Lt. Warren Sible, who wound up with the smoker, deny there was any wrongdoing within the department.

Rierson said the investigation results went to the county attorney but no action was ever taken. He said

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[1] This article was published in The Missoulian, Dec. 29, 1982, at 16, col. 1. A photograph of Sheriff Rierson was published alongside this article, with the caption "Flathead County Sheriff Al Rierson denies wrongdoing."

Salisbury was angry because he was ordered out of the detective division and back to the patrol division due to poor performance as a detective.

Sible said he obtained the smoker from a man now deceased, who had received it as a gift from the former warden.

But the warden says he never gave it to anyone and never knew the man who supposedly gave it to Sible.

Salisbury says he began investigating the theft in early 1981, after a chance encounter with the retired warden during which the man claimed Sible had stolen his smoker.

Salisbury says he began investigating the complaint after being advised by his detective supervisor Bob Soderstrom and by Rierson to treat the case like any other one.

He and a fellow deputy located the smoker, which had been repainted, at Sible's residence. They photographed it and submitted an initial report.

But then, when Salisbury's detective supervisor quit the department, Rierson put Sible in charge of the detective division and hence of the investigation.

Salisbury said about the same time he also began receiving a larger number of dead-end cases to investigate, cases where there were no leads and no witnesses.

Next, Salisbury says, Sible wrote a memo criticizing him for his "apparent shortcomings" in failing to solve more cases.

Previously, Salisbury had won praise for his work in the probe that led to the conviction of J.R. Fletcher for the Polebridge murder of Roy Cooper.

The memo also criticized Salisbury's "demeanor with female complainants" because of two earlier incidents in which he was seen with a woman in a county car in Woodland Park.

Salisbury said he had accompanied the woman at court request, and with the authorization of his former detective supervisor, to ensure that the woman's estranged husband did not attempt to abduct their child during visitation periods.

The former husband also was aware that he was under surveillance, Salisbury added.

Later, Salisbury said, Rierson removed him from detective duty and returned him to patrol duty, ostensibly as part of a program to refresh all the detectives with patrol work.

But Salisbury said he was the only detective who was reassigned to patrol work.

Salisbury's statement adds that at one point, Rierson hauled him in for a meeting at which Deputy Doris Stahnke took notes while the sheriff chewed him out.

According to Salisbury, the sheriff said he'd "heard rumors" that Salibury was calling for a grand jury investigation of the department by the attorney general.

Salisbury, who now works as a security guard and private investigator, said he quit the department in August, 1981.

"I couldn't believe this was happening to me," he said.

Rierson and Sible said the charges were lies and added that they would prosecute both Salisbury and the Missoulian for slander and libel if the smoker story is published.

Sible said the incident occurred 14 years ago when he and a friend were hunting in the Echo Lake area and came across some property for sale. The smoker was on the property, Sible said, and he commented about it to his friend.

Sible said his friend, who owned a Bigfork tavern at the time, said he thought he knew the owner of the smoker as one of his patrons.

Later, Sible said he phoned a number posted on the property for sale but could only reach the warden's ex-wife.

Subsequently, he said, his friend obtained the smoker, built one similar to it, and gave the original to Sible.

But the game warden, contacted by the Missoulian, says he never knew Sible's friend and was only in the man's tavern once.

"It was full of hippies, so I never went back," he said.

(Picture and Caption Omitted in Printing)

He also said he didn't own the smoker or the property described by Sible 14 years ago.

He maintained that the smoker had been taken from his property illegally in 1975. He said he got Sible's name from his ex-wife and later saw his smoker in Sible's yard when he went to ask the deputy about the matter.

He said no one appeared to be home the day he visited Sible's residence.

He said he complained about the incident at the time, to Sible, Rierson and anyone else who would listen.

"I think everyone in town was aware of it, because I was pretty vocal about it," he said.

But he said he was hoping for disciplinary action and decided not to press criminal charges because he didn't think the smoker was valuable enough to cost a deputy his career.

He said he told Rierson that the sheriff "had a personnel problem. He got pretty hotty about that," the former warden added, observing that Rierson didn't take criticism very well.

"I told him also that I didn't want to hear any more about it," the former warden said.

He said he was no longer angry about the incident and did not want to reopen it now because he is suffering from high blood pressure.

The five-year limit for prosecuting the case has already run out under the statute of limitation. He said when he encountered Salisbury in 1981, it was the former detective who asked about the smoker incident. He said he was reluctant to volunteer information about it but was told it was one of several incidents involving Sible that were under investigation.

Later, he said, he became worried that his smoker case was the only incident involving Sible. He was afraid his case might be part of a personal feud between Salisbury and Sible.

"I don't like getting involved in anyone's vendetta," he said. "I like to keep things on course."

Salisbury said he is aware of other incidents but could not comment on them because he had no direct knowledge of them.

A secretary to the Flathead County attorney said that office received an investigation report on the smoker case in 1981, but sent it back to the sheriff's department for more work. It never came back, she said.

She also confirmed that an investigation of a stolen saddle, whose disappearance was linked to Sible, was also returned to the sheriff's department for more work. That never came back, either, she said.

Salisbury says Rierson never told him the smoker case was settled, and the game warden never got an explanation of what happened to his smoker.

Instead, Salisbury believes his own efforts to investigate the matter eventually cost him his nine-year career with the department, by forcing him to decide whether to resign or work for people who appeared to be involved in a coverup of improper action.

Rierson said the warden could never make positive identification of the smoker, although he confirmed it looked like his smoker.

Rierson said if Salisbury did not learn the outcome of the smoker case, it is because detectives are not generally given that information. Salisbury disputed the sheriff's remark and said detectives usually learn the outcome of their cases.

Rierson said without identifying marks, it is almost impossible to prove the true ownership of stolen property to the satisfaction of a judge.

"Unless we have positive proof . . . you've got nothing to hang your hat on," he said.

"We've had to return stolen property to the thief because the owner couldn't prove it was his," Rierson said.

STATE STILL
HASN'T CHECKED
ON ALLEGATIONS [2]

By DON SCHWENNESEN
of the Missoulian

The state has not investigated a former Flathead County detective's statement detailing problems he encountered while trying to probe an alleged theft involving a fellow officer.

Due to a misunderstanding, Max Salisbury's statement was not among six filed with Flathead County Attorney Ted Lympus in October and referred to the state attorney general.

However, his statement and others reportedly were handed to Gov. Ted Schwinden during a private meeting in Kalispell early in October.

Salisbury's statement indicates that he was harassed until he quit the department after he began looking into the disappearance of a meat smoker that ended up in the possession of another deputy (see related story).

The other statements filed Oct. 13 charge that outgoing Sheriff Al Rierson intimidated four deputies and a former deputy because they failed to support him in his unsuccessful re-election campaign against Deputy Chuck Rhodes.

A spokesman for Schwinden confirmed recently that the governor received several statements in early October while in Kalispell on an official visit.

According to David Wanzenried, the governor's executive assistant, Schwinden met in October with "an officer and a private citizen in Kalispell, at their request."

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[2] This article was published in The Missoulian, Dec. 29, 1982, at 16, col. 6, immediately to the right of the article reproduced above.

During the meeting, he said, "a number of verbal allegations were made against Rierson" and several documents were given to Schwinden.

But Wanzenried said the governor advised that any written charges be given to the county attorney for proper investigation.

"The governor made it clear that the agency responsible" for mounting an investigation "was not the governor's office, nor would he serve as a mailman."

Six statements were later given to Lympus, who forwarded them to Attorney General Mike Greely. Greely's office has since passed them on to Jack Lowe, lawyer for the commissioner of political practices, who is investigating them.

Salisbury said he was not at the Kalispell meeting with the governor, but his statement was among those given to Schwinden.

He also did not attend the initial meeting with Lympus, at which the other six complaints were filed.

But he said he met briefly with Lympus a few days later, in the Flathead County Courthouse parking lot, after the first six statements had already gone to the attorney general.

Salisbury said he was told his statement might not be necessary at that time.

"I was not that concerned," he said, since he knew his statement had gone to Schwinden. He thought the documents given to Schwinden would somehow become a part of any state investigation.

Lympus told the Missoulian he did not realize when he spoke with Salisbury that the former detective had already prepared a written notarized statement.

"If he has allegations like that, he ought to send them over the Jack Lowe," Lympus said.

Lowe declined to comment on any aspect of the investigation.